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In the Supreme Court of the United States

OCTOBER TERM, 1968

HOWARD B. QUINN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 568

HOWARD B. QUINN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 398 F.2d 298.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 1968, and a petition for rehearing was denied on August 29, 1968. The petition for a writ of certiorari was filed on September 26, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it is reversible error to instruct the jury that it can be assumed from the fact that a witness swears to tell the truth that he will do so, where the charge is immediately followed by instructions concerning the factors which the jury may properly take into account in determining whether the assumption has been outweighed, and the defendant has testified and presented other witnesses in his behalf.

2. Whether the court's instruction that misapplication of funds means the "unlawful" taking or conversion of them to one's own use improperly allowed the jury to determine for itself whether the taking was unlawful, where the jury was also told that the taking or conversion must be with the intent to injure or defraud.

3. Whether the offense of misapplication of the funds of an insured savings and loan association requires proof of intent to "injure *and* defraud" the association, as distinguished from an intent to "injure *or* defraud" it.

4. Whether it was a proper exercise of discretion for the trial court to refuse to declare a mistrial because on recross-examination the prosecutor asked petitioner when the savings and loan association whose funds had allegedly been misapplied had closed.

STATUTE INVOLVED

18 U.S.C. 657 provides in pertinent part:

> Whoever, being an officer * * * of * * * any * * * savings and loan * * * association * * *

the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, * * * embezzles, abstracts, purloins or willfully misapplies any moneys * * * belonging to such institution * * * shall be fined not more than $5,000 or imprisoned not more than five years, or both * * *.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on Count 1 of a four-count indictment (A. 4-5)[1] charging that he willfully misapplied $553,166 of the funds of a federally insured savings and loan association of which he was a director, in violation of 18 U.S.C. 657.[2] On May 12, 1967, he was sentenced to three years' imprisonment, the judgment specifying that, pursuant to 18 U.S.C. 4208(a)(2), he was to be eligible for parole at such time as the Board of Parole should deem appropriate (A. 114). The court of appeals affirmed (Pet. App. 1a-13a).

Petitioner was chairman of the board of directors of the Beverly Savings and Loan Association and the

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[1] "A." refers to the appendix to petitioner's brief in the court of appeals, a copy of which is on file in the office of the Clerk of this Court.

[2] A prior conviction on all four counts had been reversed in *United States* v. *Quinn*, 365 F.2d 256 (C.A. 7). It was there held that counts 2 and 4 were fatally defective for failure to charge offenses and that a severance should have been granted as to counts 1 and 3. Petitioner's separate retrial on count 3 (involving a matter not here in issue) resulted in a hung jury and the subsequent entry of a judgment of acquittal (Pet. 8).

owner of approximately two-thirds of its capital stock. In addition, he owned the building in which the association had its offices (A. 19, 560, 569-570).[3] During March 1963, the association was experiencing a liquidity crisis.[4] Notwithstanding this fact, petitioner, who had other financial troubles, discussed with Joseph Geisen, the president of the association and a member of the board, the possibility of the association's making a prepayment of rent to petitioner. Geisen advised that he did not think such a prepayment would be proper because it would jeopardize Beverly's liquidity position and would in effect be a loan to petitioner by the association (A. 148, 153-158; Pet. App. 3a). Notwithstanding Geisen's advice, on April 2, 1963, petitioner instructed the treasurer of the association to "draw a check for four years prepayment of rent." Petitioner falsely stated that the board of directors had approved the action at its meeting of March 28 (A. 97-99, 270-272). The treasurer drew a check of the association in the amount of $553,166 (the amount of the prepayment less a 6 per cent discount), payable to the Quinn Management Company (a sole proprietorship through

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[3] The evidence is summarized in more detail in the opinion of the court of appeals (Pet. App. 2a-4a).

[4] Neither the current earnings nor the permanent reserve capital was sufficient to meet the 4½% dividend payment that was due to be made to depositors on March 31 and the board of directors, at its February 21 meeting, had authorized the issuance of 300,000 additional shares at $1 per share in order to raise the necessary funds (A. 151-153, 230-233, 241-244, 267-270, 660).

which petitioner conducted some of his businesses), and gave it to petitioner (A. 99-104, 324, 326).

On April 3, 1963, President Geisen learned about the prepayment of rent and an emergency meeting of the board of directors was called (A. 161-164, 273-274). Petitioner told the other directors that he thought he had had the board's approval for what he had done, although he admitted that Geisen had advised against it. The other directors agreed that no such authorization had been given and that petitioner should restore the money to the association. Petitioner agreed to restore the funds by April 23, the date of the board's next regular meeting. In fact, only about $50,000 was returned by that date (A. 167-168, 170, 274-276).

ARGUMENT

1. The trial court did not commit reversible error in charging the jury that it could be assumed from the fact that a witness swears to tell the truth that he will do so (A. 800). The court immediately went on to explain that "[t]his is an assumption, however, which can be outweighed by the manner in which he testifies, the character of the testimony which he gives, or by contradictory testimony or evidence which we find more believable" (A. 800). The court elaborated at some length on the factors which the jury might properly take into account in evaluating a witness' testimony (his intelligence, motive, state of mind, interest in the outcome, degree of corroboration, etc.) and charged that if the jury found "the assumption of truthfulness with respect to all wit-

nesses" to be "outweighed as to any witness" it should give the testimony of that witness "such credibility, if any, as you may think it deserves" (A. 800-802). These instructions were taken, practically *verbatim*, from the recommended charge to the jury which appears in Mathes and Devitt, *Federal Jury Practice and Instructions, Civil and Criminal* (1965), § 9.01.[5] A number of courts have sustained such a charge—at least where, as here (see A. 497-541, 551-675), the defendant has testified himself and presented other witnesses in his behalf, so that the defense derives as much benefit from the charge as the prosecution. *United States* v. *Hoffa*, 349 F.2d 20, 52-53 (C.A. 6), affirmed on writ limited to other issues, 385 U.S. 293; *United States* v. *Persico*, 349 F.2d 6, 11-12 (C.A. 2) *(dictum)*; *People* v. *Garcia*, 129 Cal. App. 2d 251, 254-255 (1954); *People* v. *Fratianno*, 132 Cal. App. 2d 610, 629 (1955); *Coates* v. *State*, 192 Ga. 130, 136-137 (1941).

While the challenged charge has been criticized by some courts, particularly where the defendant did not testify, on the ground that it tends to derogate from the presumption of innocence,[6] we know of but one

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[5] An earlier version of the proposed instruction had referred to a "presumption" that a witness testifies truthfully (Mathes, *Jury Instructions and Forms for Federal Criminal Cases*, 27 F. R. D. 39, 67-68 (1960)). The later version substitutes the word "assumption," the term used by the court in this case.

[6] See, *e.g.*, *United States* v. *Bilotti*, 380 F.2d 649, 654-656 (C.A. 2), certiorari denied, 389 U.S. 944; *Stone* v. *United States*, 379 F.2d 146 (C.A.D.C.); *United States* v. *Roviaro*, 379 F.2d 911, 915 (C.A. 7); *United States* v. *Meisch*, 370 F.2d 768, 773-774 (C.A. 3).

case, *United States* v. *Johnson*, 371 F.2d 800, 804-805 (C.A. 3), in which a ruling of reversible error was based solely on the giving of such a charge. That case is clearly distinguishable from this one because there the defendant had presented no evidence and, thus, the instruction "operated exclusively in favor of the government and amounted in effect to a presumption of the defendant's guilt" (371 F.2d at 805). In each of two other cases, *United States* v. *Evans*, 398 F.2d 159 (C.A. 3) (cited at Pet. 3 and 13), and *McMillen* v. *United States*, 386 F.2d 29, 32-36 (C.A. 1), certiorari denied, 390 U.S. 1031, the giving of such an instruction was a partial basis for a ruling of reversible error in circumstances where, as here, the defendant had testified and presented other evidence. Both of those cases are distinguishable from this case, however, in that in each the reversal was based not merely on the giving of an instruction of the type here challenged but on the giving of that instruction *coupled with* a failure to give a cautionary instruction concerning the need for scrutinizing the testimony of an accomplice with care.[7] Because of this combination of factors, new trials were ordered. Since the present case involves no issue pertaining to accomplice testimony (or any comparable interrelated question) and the jury was carefully charged with respect to the presumption of

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[7] An additional factor leading to the reversal in the *Evans* case was the erroneous admission of evidence concerning a prior conviction of a critical defense witness.

innocence, the *Evans* and *McMillen* cases are distinguishable and no conflict between circuits is presented.

2. There is no merit in petitioner's contention (Pet. 3-5, 14-18) that the trial court erred when, in instructing the jury as to the meaning of the term "misapplies", it said (A. 811):

> * * * What does misapplication or misapply mean? As used in the statute and as used in this indictment, it means the unlawfully [*sic*] taking or conversion by a person to his own use of the moneys or funds of an insured savings and loan association.

Petitioner argues that the instruction improperly left it to the jury to decide whether the conversion of funds involved in this case was unlawful (Pet. 15, 17). The jury was also told, however, that the taking or conversion, to be punishable, had to be "with the intent to injure or defraud the association" (A. 814-815, 816, 820, 821, 822). In light of this repeated reminder by the court of the necessity of a finding of an intent to injure or defraud, the use of the word "unlawfully" in the instruction was not prejudicial. Cf. *United States* v. *Hickey*, 360 F.2d 127, 144 (C.A. 7), certiorari denied, 385 U.S. 928, where an almost identical instruction was given. The court of appeals correctly noted that the trial court's "clear and exhaustive instruction dealing with the facts in the case at bar * * * correctly informed the jurors in language easily understood by laymen of the meaning of the words 'misapplication' and 'misapplied' as pertinent to this case" (Pet. App. 10a, n. 4).

3. Petitioner also contends (Pet. 5, 18-20) that the offense of misapplication of funds defined by 18 U.S.C. 657 requires proof of intent to "injure *and* defraud" the institution concerned—as distinguished from intent to injure *or* defraud. However, the decisions under that statute and under the similarly phrased 18 U.S.C. 656 [8] uniformly refer to the intent required to be proved as one to "injure or defraud". *United States* v. *Hickey*, 360 F.2d 127, 144 (C.A. 7), certiorari denied, 385 U.S. 928; *Giragosian* v. *United States*, 349 F.2d 166, 168 (C.A. 1); *Golden* v. *United States*, 318 F.2d 357, 361-362 (C.A. 1); *Logsdon* v. *United States*, 253 F.2d 12, 15 (C.A. 6); *Seals* v. *United States*, 221 F.2d 243, 245 (C.A. 8). Indeed, under the progenitor of these enactments, Section 5209 of the Revised Statutes, the requisite intent was specifically defined in the disjunctive:

> Every president, director, * * * or agent of any [national banking] association, who embezzles, abstracts, or willfully misapplies any of the moneys * * * of the association * * * with intent * * * to injure or defraud the association * * * [9]

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[8] 18 U.S.C. 656, providing for the punishment of "Whoever, being an officer * * * of * * * any Federal Reserve bank, member bank, national bank or insured bank, * * * embezzles, abstracts, purloins or willfully misapplies any of the moneys * * * of such bank * * *," is, so far as relevant, identical with 18 U.S.C. 657 except as regards the type of institution protected.

[9] The "intent" clause of Section 5209, which does not appear in the section's current counterparts, 18 U.S.C. 656 and 657, has been read into the latter through judicial construc-

Although in *United States* v. *Britton*, 107 U.S. 655, the Court referred in several instances to the intent required to be proved under Section 5209 as one to "injure and defraud" the association whose funds were involved (107 U.S. at 665, 666, 668, 669), the apparent reason for the Court's use of the conjunctive was that the indictment there in issue had used it (107 U.S. at 657-659). On other occasions the Court used the disjunctive phrase of the statute itself, "injure or defraud" (at 662, 666), and it is apparent from the opinion as a whole that the two terms were used interchangeably. There is thus nothing in the decision which supports petitioner's present contention; the distinction to which he refers was simply not in issue.[10]

4. The trial court did not abuse its discretion in refusing to declare a mistrial because government counsel asked petitioner on recross-examination, "When did Beverly Savings and Loan Association close, Mr. Quinn?" (A. 674-675). Petitioner had testified on direct examination that the association's assets had grown under his stewardship from less than $1,000,000 in 1958 to approximately $36,000,000 in early 1963 (shortly prior to the alleged misapplication of funds), and the substance of this testimony had been repeated on redirect (A. 554-555, 567-568,

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tion in recognition of their derivation from the older enactment. Cf. *Seals* v. *United States*, 221 F.2d 243, 245 (C.A. 8); *Williamson* v. *United States*, 332 F.2d 123, 134, n. 16 (C.A. 5).

[10] This is equally true of the lower court decisions cited at Pet. 19, which petitioner says "followed" the *Britton* decision.

670-671). As the court of appeals observed, this "effort * * * to 'puff up' the stature of defendant in the eyes of the jury * * * invited the natural question of 'what became of Beverly?'" (Pet. App. 13a). The trial court sustained the defense's objection to the question (A. 675) and instructed the jury to ignore it and its implications (A. 695-696). In light of the provocation which elicited the query, this disposition of the incident lay within the court's discretion. Cf. *United States* v. *Caruso*, 358 F.2d 184, 186 (C.A. 2), certiorari denied, 385 U.S. 862; *Reistroffer* v. *United States*, 258 F.2d 379, 396 (C.A. 8), certiorari denied, 358 U.S. 927; *Bilderback* v. *United States*, 249 F.2d 271, 276-277 (C.A. 5), certiorari denied, 356 U.S. 946.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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